BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUAN MANUEL DUARTE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,005,857
HAYES COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
and HAYES COMPANY, INC. (Self-Insured)	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 4, 2004 Award of Administrative Law Judge Nelsonna Potts Barnes wherein claimant was awarded benefits for a 6 percent impairment of function to the body as a whole after the Administrative Law Judge (ALJ), in applying *Ramirez*,[1] held that claimant was not entitled to a work disability benefit because he was terminated for cause, having earlier falsified his employment application with respondent. The Appeals Board (Board) heard oral argument on November 16, 2004.

APPEARANCES

Claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. Respondent, as a qualified self-insured, appeared by its attorney Terry J. Torline of Wichita, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company (Liberty) appeared by their attorney, Jack J. Hobbs of Wichita, Kansas.

[1] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. Additionally, originally claimant alleged a traumatic accident on August 30, 2001, and a series of accidents through April 17, 2002, claimant's last day worked with respondent. It was stipulated that Liberty provided workers compensation insurance coverage for respondent up to April 10, 2002, with respondent as a qualified self-insured for the period April 10, 2002, through April 17, 2002. At oral argument before the Board, the parties acknowledged that the appropriate date of accident in this case was August 30, 2001, with no series of accidents through April 17, 2002, being claimed. It was, therefore, agreed between the Board and the parties that Hayes Company, Inc., as a qualified self-insured, had no liability in this matter. However, Hayes Company, Inc., as a respondent being represented by Liberty, remains as a party in this litigation.

ISSUES

What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant, a several-year employee of respondent, was injured on August 30, 2001, when, while working as a welder, he was helping move a box, suffering an injury to his low back. The box slipped while claimant was helping carry it, with claimant experiencing immediate pain in his back and in his left leg. He was referred to Associates in Health Care, and later to Anthony G.A. Pollock, M.D., a board certified orthopedic surgeon.

Dr. Pollock first examined claimant on September 14, 2001, at which time he recommended an MRI. The MRI displayed an L4-5 disc herniation, with some bilateral neural foraminal stenosis and a right posterior lateral bulge at L5-S1 without significant encroachment. A course of epidural steroid injections was recommended. Claimant underwent an epidural steroid injection on September 25, 2001, but advised the doctor on October 9, 2001, that the relief from the epidural steroid injection only lasted one day. Claimant continued to have symptoms.

Dr. Pollock felt claimant might be capable of performing light duty and released claimant to light duty work on October 10, 2001, with claimant returning to work four hours

a day, applying labels. Dr. Pollock did discuss with claimant the possibility of surgery, but claimant rejected the idea.

On February 8, 2002, claimant returned to Dr. Pollock, advising that he was tolerating the light duty work, although he still continued to experience symptoms. Claimant was provided a rating on March 27, 2002, of 6 percent to the body as a whole pursuant to the AMA *Guides*.[2]

On April 17, 2002, claimant was involved in a seasonal layoff, along with between 50 and 100 of respondent's employees. He was advised at the time of the layoff that respondent would begin rehiring in possibly September or October, with the seasonally laid off employees, such as claimant, being brought back first. Claimant was advised by Sandra LeSage, respondent's safety director, that he was on the list to be rehired. However, on or about August 23, 2002, Ms. LeSage received a letter from claimant's attorney notifying her of the workers compensation injury suffered by claimant. As a result of receiving that letter, an investigation was undertaken by respondent's attorney, whereupon it was discovered that claimant had no less than three prior workers compensation claims. Claimant had suffered a back injury in 1995 while working for Western Saw in California. Claimant settled that claim for approximately $26,000, although the particulars of that settlement are not contained in the record.

Claimant suffered an additional low back injury on September 22, 1998, while working for a company called LSI and a right hand injury with LSI on August 17, 1998.

Claimant began working for respondent in September 1998, shortly after suffering the LSI back injury. At the time claimant was hired, he was undergoing treatment for the LSI back injury, but provided no information to respondent on his application regarding the ongoing medical treatment or the fact that claimant had suffered a workers compensation injury.

Claimant acknowledged that he never told respondent that he had been injured at LSI. Further, according to the testimony of Ms. LeSage, claimant, on the job application he filled out with respondent, indicated that he had no prior workers compensation injuries. He further failed to tell respondent about any permanent restrictions from those prior injuries.

After determining that claimant had lied on his application, respondent terminated claimant's employment.

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

The ALJ, in reviewing the evidence, applied the logic of *Ramirez*, finding that claimant had lost his entitlement to an award of work disability because he was terminated for cause stemming from the falsification of his employment application. The ALJ went on to find that "[b]ut for his termination for cause, claimant would have been employed by respondent at a comparable wage."

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[3] The ALJ was correct in citing *Ramirez* as an appropriate precedent-setting case in this matter. The claimant in *Ramirez* was terminated for failing to disclose on his employment application that he had prior workers compensation claims involving his back. In *Ramirez*, the injury claimed against the respondent Excel Corporation involved bilateral carpal tunnel syndrome, Guyon canal syndrome, bilateral bicipital tendinitis, bilateral tennis elbow and trigger fingers of the left third, fourth and fifth digits. The Kansas Court of Appeals in *Ramirez* found that its prior decisions in *Perez*[4] and *Foulk*[5] were controlling and reversed the Workers Compensation Board's award of benefits in excess of the claimant's functional impairment. The Board finds that the logic of *Ramirez* also applies to this matter.

However, the application of *Ramirez* would not apply until the point at which claimant was eligible for rehire in September 2002. Up to that point, claimant was simply involved in a seasonal layoff, which may still entitle an employee to a permanent partial disability benefit if involved in an economic layoff.[6] The Board, therefore, finds claimant is eligible for work disability benefits during the time he was off work, but before he would have been brought back to work by respondent, had he not been denied the opportunity due to his falsification. Therefore, claimant, under K.S.A. 44-510e, is eligible for a permanent partial general disability through September 1, 2002, the time respondent had indicated it would begin rehiring the laid off employees.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average

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[3] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[4] *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

> weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In applying K.S.A. 44-510e to the period April 18, 2002, through September 1, 2002, the Board finds two task loss opinions contained in the record. Dr. Pollock, in reviewing the task loss created by vocational expert Terry L. Cordray, found claimant to have suffered a 14.3 percent loss of task performing ability. Dr. Murati, on the other hand, after reviewing the task list of Jerry Hardin, found claimant to have suffered a 63 percent task loss. The Board finds no reason to afford greater weight to the opinion of one physician over the other and, therefore, averages the task loss opinions, resulting in a task loss of 38.65 percent.

The Board must also consider K.S.A. 44-510e in light of the requirements of *Copeland.*[7] *Copeland* requires that a claimant put forth a good faith effort to find appropriate employment. If such a finding is made, then the difference in pre- and post-injury wages is calculated based upon the actual wages. In this instance, claimant testified that after being laid off from respondent, he applied for and began receiving unemployment compensation, which mandates a job search while the unemployment benefits are being received. Claimant discussed several places where he had applied, indicating that he was applying for at least two jobs a week in his ongoing job search. The Board finds, in applying the policies of *Copeland*, that claimant did put forth a good faith effort to obtain employment during the period April 18, 2002, through September 1, 2002, and, therefore, claimant's wage loss during that period is 100 percent. When averaging claimant's wage loss of 100 percent with his task loss of 38.65 percent, the Board finds for the period April 18, 2002, through September 1, 2002, claimant has a 69 percent permanent partial general disability pursuant to K.S.A. 44-510e. Effective September 2, 2002, pursuant to *Ramirez*, claimant is reduced to his functional impairment of 6 percent to the body as a whole as was awarded by the ALJ.

Claimant's permanent partial general disability period for the 69 percent permanent partial general disability comprises 19.57 weeks of benefits.

The parties have stipulated that claimant was paid 28.26 weeks temporary total disability compensation, but with no indication as to the dates for which those temporary total disability payments were made. Claimant was off work after the August 30 injury until being returned to light duty on October 10, 2001, a period of 5.71 weeks. Claimant then

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[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

worked from October 10, 2001, through his layoff on April 17, 2002. The 6 percent impairment to the body on a functional basis computes to 24.1 weeks of permanent partial general disability compensation, all of which would have been paid or payable prior to claimant's layoff on April 17, 2002. After claimant's layoff, claimant became entitled to a permanent partial general disability based upon a work disability of 69 percent through September 1, 2002, which comprises a period of 19.57 weeks of benefits. Thereafter, pursuant to the above application of *Ramirez*, claimant is reduced to his functional impairment of 6 percent, all of which was due, owing and paid or payable during the time claimant was working light duty for respondent prior to the layoff. Therefore, as of September 1, 2002, no additional disability benefits would be due and owing.

As the record does not specify when the weeks of temporary total disability compensation were paid, the Board's computation will take into consideration the full 28.26 weeks as stipulated, but will pay the temporary total disability compensation during periods not covered by the 6 percent permanent partial general disability on a functional basis or by the 69 percent permanent partial general work disability period of April 18, 2002, through September 1, 2002.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated June 4, 2004, should be modified to award claimant a 6 percent permanent partial general disability on a functional basis, followed by a 69 percent permanent partial general disability for the period April 18, 2002, through September 1, 2002.

Claimant is, therefore, entitled to 28.26 weeks of temporary total disability compensation at the rate of $295.79 per week totaling $8,359.03, followed thereafter by 24.1 weeks of permanent partial general disability compensation at the rate of $295.79 per week totaling $7,128.54 for a 6 percent permanent partial general disability on a functional basis, followed thereafter by 19.57 weeks of permanent partial general disability compensation at the rate of $295.79 per week totaling $5,788.61 for a 69 percent permanent partial general disability through September 1, 2002, at which time all benefits will cease, for a total award of $21,276.18. As of the time of this award, the entire amount is due and owing, and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Terry J. Torline, Attorney for Self-Insured Respondent
Jack J. Hobbs, Attorney for Respondent and its Insurance Carrier (Liberty)
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director